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Supreme Court of the United States

October Term, 1956

No. ~~710~~ 70

ALBERT L. TROP,

Petitioner,

vs.

JOHN FOSTER DULLES, as Secretary of State of the United States, and UNITED STATES DEPARTMENT OF STATE.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

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Opinion Below

The opinions of the District Court (R. 5) have not been reported. The opinion of the Court of Appeals (R. 10-13) is reported at 239 F. 2d 527.

Jurisdiction

The judgment of the Court of Appeals was rendered on December 28, 1956 (R. 10). Petition for a writ of certiorari was filed on January 24, 1957 and was granted on March 4, 1957 (R. 15). The jurisdiction of this Court rests on U. S. C. Title 28, Section 1254(1).

Statute Involved

Subsection (g) of Section 401 of the Nationality Act of 1940, as amended January 20, 1944 (58 Stat. 4), now, with a few verbal changes, subsection (8) of Section 349 of the Immigration and Nationality Act of 1952 [U. S. C. Title 8, Section 1481(a)(8)]:

> "(a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—
>
> "(8) deserting the military, air, or naval forces of the United States in time of war, if and when he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military, air, or naval forces: *Provided*, That, notwithstanding loss of nationality or citizenship under the terms of this chapter or previous laws by reason of desertion committed in time of war, restoration to active duty with such military, air, or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military, air, or naval authority shall be deemed to have the immediate effect of restoring such nationality or citizenship heretofore or hereafter so lost; * * *."

Question Presented

May Congress deprive a native born citizen of his nationality solely because he has been convicted of the technical offense of desertion for one day in war time by court martial and, for that reason, dishonorably discharged from the armed forces, absent any contact with the enemy or with any foreign state or intent to make such contact, with the result that loss of American nationality would result in statelessness?

Statement

Petitioner brought this suit, pursuant to U. S. C. Title 28, Section 2201, and Title 8, Section 1503, for a declaratory judgment that he is a citizen of the United States (R. 2). The suit arose because of the denial of a passport applied for in 1952 (R. 2). The denial rested solely on the claim by the State Department that petitioner had lost his American nationality because of dishonorable discharge from the army following a court martial conviction for desertion * in time of war (R. 2).

The case was decided in the District Court on the basis of affidavits and documents presented by the parties on cross-motions for summary judgment (R. 5). Both parties agreed there were no facts in dispute and the Court so found (R. 5).

The papers submitted in the District Court showed the following (R. 2, 3):

Petitioner is a native born citizen. While serving in the army in 1944 in French Morocco he was confined in Casablanca for a breach of discipline and, finding conditions intolerable, he escaped from confinement. He was then 20 years old. Petitioner has not become a foreign national, nor intended to become one, nor did he have any contact with an enemy, nor did he desert to the enemy—he did not even try to reach the Spanish-Moroccan border.

On the basis of those facts court martial proceedings were instituted. One of the charges was "Desertion from May 22 to May 23, 1944" (R. 4). At this court martial there was no claim that petitioner had deserted to the enemy or attempted to do so. On the contrary, the testi-

* The definition of deserter was in 1944 (10 U. S. C. 1499): "Any person subject to military law who quits his organization or place of duty with intent to avoid hazardous duty or to shirk important service."

mony showed that he surrendered without question to an American officer the day after he escaped (R. 4). He was convicted on all the charges and dishonorably discharged (R. 9).

The District Court denied petitioner's motion and granted that of respondent without, in either of his brief memoranda, discussing any of the constitutional issues raised by petitioner (R. 5).

The majority of the Court of Appeals, in an opinion by Judge L. Hand (R. 10), also did not discuss those issues, contenting themselves with the statement that there was not sufficient doubt about the constitutionality of the statute to limit it, as petitioner had asked, to desertions to the enemy. Judge Hand appeared to be of the view that petitioner's chief contention was that he could not lose his nationality without intending to do so, and, to overcome that man of straw, Judge Hand cited *Mackenzie* v. *Hare*, 239 U. S. 299; *Savorgnan* v. *United States*, 338 U. S. 491; *Revedin* v. *Acheson*, 194 F. 2d 482, cert. den. 344 U. S. 820. As we shall show, those cases are not dispositive of the issue here presented.

In dissent, Judge Clark (R. 13) expressed the view that loss of nationality under the circumstances here disclosed would constitute cruel and unusual punishment. The majority did not discuss that question, claiming it had not been urged upon them by petitioner (R. 13).

Summary of Argument

The present case presents a problem of expatriation never before considered by this Court. It differs from *Nishikawa* v. *Dulles*, No. 415, and *Perez* v. *Brownell*, No. 572, which are being heard at the same time, in that the act which resulted in the claimed loss of nationality here did not have to occur in any foreign country and did not involve any conceivable aspect of dual citizenship.

Petitioner has been, thus far, deprived of his native born American citizenship without his having performed any act which in any way looked to the acquisition of citizenship elsewhere. There is no reasonable relationship between the act of technical one day desertion which formed the basis of the court martial and the consequent dishonorable discharge, and loss of nationality which the Act of Congress imposed for such act.

Insofar as the statute purports to deprive a native-born citizen of his nationality it is both in excess of the power of Congress and in violation of the due process clause of the Fifth Amendment. The cases relied on by the Court of Appeals all involved acts by which a second nationality was acquired. Wherever a dual nationality is acquired (or reacquired) the problem is that of discovering which is the *preferred* nationality and in such cases it is proper for Congress to establish evidentiary rules to aid the courts in determining whether United States citizenship has been voluntarily renounced in favor of the dual nationality. The power of Congress thus to regulate dual nationality has no bearing in this case. An act which has no reference to the acquisition or reinstatement of another nationality cannot be irrebutably presumed to manifest a voluntary renunciation of United States nationality. Such a presumption is inherently irrational and a gross violation of due process.

The statute may not be sustained as imposing an additional punishment for the offense already punished by the sentence of the court martial. But if so construed, rational relationship between the offense and the nature of the punishment is lacking. Moreover, such punishment, involving as it does the creation of a stateless status, would conflict with the Eighth Amendment guaranty against cruel and unusual punishment.

These grave constitutional problems could be avoided by confining the operation of the statute to desertions involving actual contact with the enemy. In that event the statute would have no application to petitioner.

ARGUMENT

I.

The power of Congress to expatriate is confined to a consent to expatriation desired by the citizen or to a regulation of dual citizenship.

The historical basis for the existing laws with regard to expatriation has been so fully described in the brief for petitioner in the *Perez* case (pp. 9-13) that we believe it useful to make only a few additional observations.

Early in our history Justice Paterson of this Court, in *Talbot v. Janson*, 3 Dall. 133, 153 (1795), suggested the desirability of an expatriation statute. The problem there arose because a person involved in privateering claimed he had become a French citizen. Justice Paterson observed that expatriation could not exist without a departure "with intention to leave this country, and settle in another. Ballard was and still is a citizen of the United States, unless perchance he be a citizen of the world. The latter is a creature of the imagination, and far too refined for any republic of ancient or modern times". Thus, by anticipation, he rejected the concept of statelessness. Justice Iredell discussed the matter further, pointing out (p. 162) that expatriation requires the consent of the government of original citizenship. But nowhere was it suggested that expatriation could be imposed. It is interesting to observe that Justice Iredell expressed doubt (p. 163) about the constitutionality of banishment.

As noted in the *Perez* brief (p. 12), no statute specifying the basis on which an American national might expatriate himself was enacted until 1907 (34 Stat. 1228) and that specified only three grounds: actual foreign naturalization, subscription to a foreign oath of allegiance and, in the case of a woman, marriage to a foreigner. All three grounds

involved regulation of dual nationality. It was not until 1940 that Congress attempted to provide for expatriation in other situations.

We submit that Congressional power is restricted to prescribing the permissible forms by which a citizen's desire to expatriate himself may be manifested or to regulation of dual nationals. It does not extend to a situation such as is here presented. Since there is no express provision in the Constitution giving Congress any control whatever over the nationality of native born citizens, its right to exercise such control must rest on the nebulous concept of the inherent right of sovereignty. That right would be sufficient to support a regulation of dual nationals abroad and might, therefore, be sufficient to uphold certain of the subsections of the 1940 law, as, for instance, subsections (e) and (e), which dealt with service in foreign forces and voting in foreign elections. Such acts might, under certain circumstances justify an inference of expatriation. But that would support only a rebuttable presumption, not the fiat of the present law. The power to deal with dual nationals would also support Congressional definition of the precise forms whereby allegiance to a foreign country might be exhibited—as, for instance, subsections (a), (b), (d) or (f) of the 1940 Act. But neither of these concepts justifies subsection (g) here involved. Petitioner never had dual nationality; he has done nothing evincing an intention to acquire any foreign citizenship; he has done nothing which could achieve that result. Petitioner has done nothing to show, to quote from the Cabinet Committee which sponsored the 1940 recodification, that his "real attachment is to the foreign country and not to the United States" (See *Dos Reis* v. *Nicolls*, 161 F. 2d 860, at 863, 864).

Indeed, in the case at bar there is no foreign country involved at all. For the circumstance that petitioner's "desertion" occurred outside the United States is wholly

accidental. Petitioner did not choose to go to North Africa; he was taken there as a member of the armed forces. Nor does the statute in any way condition its effect on the presence of the "deserter" in a foreign country.

As will appear from a review of this Court's decisions in this area, it has only twice sustained deprivation of a native born American's nationality. And in both those cases, *Mackenzie* v. *Hare*, 239 U. S. 299, and *Savorgnan* v. *United States*, 338 U. S. 491, the acts held to constitute expatriation were such that by virtue of them a new nationality was voluntarily acquired. In each case American international relationships were involved, with the possibility of diplomatic embarrassment. But here the act charged had no connection with any other nation and could not possibly result in diplomatic embarrassment. To paraphrase *Savorgnan* at p. 500, loss of nationality cannot be regarded as among the "usual legal consequences" of every war time desertion.

The actual decision in *Mackenzie* was only that a native born woman lost her citizenship by marriage to an alien because of the ancient principle of "identity" of husband and wife. As Mr. Justice McKenna said:

> "* * * and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband. It has purpose if not necessity, in purely domestic policy; it has greater purpose and, it may be, necessity, in international policy * * *" (p. 311).
>
> "* * * The marriage of an American woman with a foreigner has consequences of like kind, may involve national complications of like kind, as her physical expatriation may involve. Therefore, as long as the relation lasts it is made tantamount to expatriation. This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would

> not only be valid but demanded. It is the conception of the legislation under review that such an act may bring the Government into embarrassments and, it may be, into controversies. It is as voluntary and distinctive as expatriation and its consequence must be considered as elected" (p. 312).

The considerations which there led this Court to that conclusion are, of course, wholly absent here.

In the *Savorgnan* case, *supra*, this Court in effect limited the broad statement of *Mackenzie* to the situation where the native born citizen had left the United States and taken up residence in the country of her choice. Indeed, in that case the government conceded that since 1933 the State Department had considered that expatriation could not result without actual residence abroad (338 U. S. at 503).

In *Perkins* v. *Elg*, 307 U. S. 325, where this Court ruled that citizenship could not be lost because of parental action during minority, Chief Justice Hughes stressed that expatriation must result from voluntary action (p. 334):

> " * * * Expatriation is the voluntary renunciation or abandonment of nationality and allegiance. It has no application to the removal from this country of a native citizen during minority. In such a case the voluntary action which is of the essence of the right of expatriation is lacking. That right is fittingly recognized where a child born here, who may be, or may become, subject to a dual nationality, elects on attaining majority citizenship in the country to which he has been removed. But there is no basis for invoking the doctrine of expatriation where a native citizen who is removed to his parents' country of origin during minority returns here on his majority and elects to remain and to maintain his American citizenship. Instead of being inconsistent with the right of expatriation, the principle which permits that election conserves and applies it."

Later cases decided by this Court have added nothing in elucidation of the problem here present. *Mandoli* v. *Acheson*, 344 U. S. 133, dealt only with dual nationality. This Court rejected the government's claim that American citizenship had been lost by service in the Italian army because that service and the accompanying oath of allegiance had not been voluntary. And it rejected the further claim that citizenship had been lost because of failure to return to the United States upon reaching 21 years because the provision dealing with that subject affected only naturalized citizens. This Court, therefore, did not discuss any questions of Congressional power and the dissenters based their views solely on the fact that an oath of allegiance to Italy had been taken by plaintiff.

Kawakita v. *United States*, 343 U. S. 717, presented the problem in reverse. There a person born in this country of Japanese citizens claimed that he had expatriated himself and therefore could not be prosecuted for treason. He based his claim on the fact that under Japanese law he was a Japanese national despite his birth in the United States and that while in Japan after the outbreak of the war he registered in the Japanese Family Census Register, claiming that he thereby renounced his American nationality. The trial court left it to the jury to determine whether or not he had expatriated himself because after the war he held himself out to be an American citizen and claimed that what he had done in Japan was the result of pressure. This Court affirmed the conviction for treason on the ground that the issue whether Kawakita had intended to make a declaration of allegiance to Japan had been properly left to the jury.

Acheson v. *Okimura*, 342 U. S. 899, and *Gonzales* v. *Landon*, 350 U. S. 920, went off on the sufficiency of the evidence. No one of these cases discussed the extent of Congressional power.

But the Court of Appeals for the First Circuit in *Dos Reis* v. *Nicolls*, 161 F. 2d 860, at 862, has expressed doubts about Congressional power. The court, however, so construed the applicable statute as to make it unnecessary to deal directly with the constitutional issue.

In *Okimura* v. *Acheson*, 99 F. Supp. 587, the Court held certain statutory provisions unconstitutional as dealing with situations other than voluntary expatriation. The Court said:

> "It is the view of this Court that while the Constitution gives the Congress plenary power over citizenship by *naturalization*, it leaves the Congress no power whatsoever to interfere with American citizenship by *birth*.
>
> "The leading case on this subject is United States v. Wong Kim Ark, 1898, 169 U. S. 649, 18 S. Ct. 456, 42 L. Ed. 890. While some of its teachings seem to have been occasionally forgotten or whittled down in recent years, it has never been overruled." (p. 589)
>
> * * *
>
> "Section 800 of Title 8, United States Code Annotated, deals eloquently with the 'right' of expatriation, yet Section 801, applicable alike to native and naturalized citizens, attempts to spell out some ways in which that 'right' may become a liability.
>
> * * *
>
> "Congress may not thus declare that by performing such and such an act, in or out of the United States, a citizen will become expatriated. Congress has been given control over only one means of *creating* United States citizenship, namely by naturalization. It has the power to create and to condition that grant of citizenship; but is wholly devoid of any power to destroy citizenship by birth" (p. 590).

After this Court remanded the case for further proof, without any discussion of the constitutional issue (*Acheson* v. *Okimura, supra*), the District Court adhered to the views previously expressed (111 F. Supp. 303)—but since the case was also decided on the facts it was not appealed. In *Terada* v. *Dulles*, 121 F. Supp. 6, the same views were elaborated.

These various opinions suggest the principle that Congress may provide for loss of nationality—or, in another sense, consent to the citizen's surrender of his nationality—in cases where the citizen has, by his own voluntary act, acquired a new nationality or, where dual citizenship exists, chosen to adhere to the other nationality. We submit that this is the extent of Congressional power.

This, indeed, is what this Court held in *Mackenzie* and repeated in *Savorgnan*. But the lower courts have distilled a different doctrine from the statement in *Mackenzie*: that *any* act which Congress describes as one of voluntary expatriation is a "ground" for expatriation if performed without duress. The extent to which the new doctrine of compulsory expatriation has gained headway in the lower courts is startling. It is, perhaps, best exemplified by the comment of the Court of Appeals for the Ninth Circuit in *Perez*, 235 F. 2d at 365, where Judge Tolin said:

> "Legislation providing for expatriation has been known in the United States at least since 1865 when Congress provided for forfeiture of the right of citizenship of deserters and enlisted draftees who depart from their district or from the United States with intent to avoid draft into the armed forces. The validity of the Act was assumed and its effectiveness as an expatriation statute applied in a series of cases.
>
> "It is not difficult to appreciate that a nation which requires successful applicants for naturaliza-

> tion to take an oath that they will render either military or certain service in lieu thereof, to the United States, would logically impose expatriation upon native-born citizens who repudiate a like obligation. * * *"

As to the 1865 statute, it should be noted that *Kurtz* v. *Moffitt*, 115 U. S. 487, cited by Judge Tolin as authority for the proposition that the statute was valid and resulted in expatriation, does not support his conclusion. This Court there held only that a deserter could not be arrested by a state officer. Its only reference to the 1865 Act was that "forfeiture of all rights of citizenship" could take effect only upon court martial conviction. *In re Carver*, 142 Fed. 623, and *United States* v. *Snow*, 27 Fed. Cas. 1255, also cited by Judge Tolin, spoke only in terms of "rights of citizenship" under the 1865 and 1912 versions of the statute, which they were not called upon to, and did not, apply.

This distinction, between loss of nationality and loss of rights of citizenship, was elaborated by the distinguished Argentine jurist, E. S. Zeballos. In part two of his lectures on nationality * he said:

> "The confusion is serious, since nationality is a question of international law. It often contrasts the nationality of an inhabitant of one place with his nationality in another. On the contrary, the right of citizenship is a matter of internal politics, its object is to enable a man or woman to exercise an influence on the conduct of government and to take part in it."

In other words, since nationality is a matter of international law it can be regulated only where international considerations come into question and not, as the lower courts seem to think, because of solely domestic concerns.

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* La Nationalite—Denationalisation (1919), pp. 262-263 (freely translated). See also his discussion of the early American history of the subject at pp. 331-379.

We urge, therefore, that this Court once and for all put an end to the noxious doctrine that expatriation may be imposed, whether as punishment or for any other considerations which may, from time to time, sway a Congressional majority. The subsection here under review should be struck down as wholly beyond Congressional power. That this Court will not hesitate to strike down an Act of Congress when it transcends its power is evident from *Toth* v. *Quarles*, 350 U. S. 11. There the Court held that the war power, extensive though it be, did not permit Congress to vest courts martial with jurisdiction to try former service personnel for crimes committed while in the service. So here this Court should conclude that, despite the broad scope of the doctrine of "inherent sovereignty," Congress has no power to decree denationalization except as a regulation of dual nationality or in a case where some step has been taken by the American citizen toward obtaining foreign citizenship.

II.

The subsection here relied on is beyond the power of Congress for lack of rational relation between citizenship and the act specified.

If Congress has power over the citizenship of native born Americans beyond that above described, that power must be exercised within the general limitations of the Constitution. One of these limitations is the due process clause of the Fifth Amendment. There can be no doubt that it is applicable here. Since it is a limitation on the power of Congress in dealing with aliens * it follows, a

* See *Zakonaite* v. *Wolf*, 226 U. S. 272; *Wong Wing* v. *United States*, 163 U. S. 228. Cf. *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481. This was recognized both in *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 586, and *Galvan* v. *Press*, 347 U. S. 522, 530. Cf. *Gonzales* v. *Landon*, 350 U. S. 920.

fortiori, that it limits Congressional power over expatriation.

While this Court has, in recent years, indicated a reluctance to strike down legislation because of a lack of reasonable relationship between its objective and the regulation or penalty imposed (*Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U. S. 525, 536; *Gibbney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 499), it has, nevertheless, not hesitated to do so in a proper case. Thus, in *Slochower* v. *Board of Higher Education*, 350 U. S. 551, the Court struck down a provision of the charter of the City of New York because the penalty, forfeiture of position by reason of the exercise of the privilege against self-incrimination before a body having no jurisdiction whatever over the conduct of the municipal employee, had no rational relation to the objective of the law, namely, disclosure to a public body concerned with the conduct of public employees.

In *Wieman* v. *Updegraff*, 344 U. S. 183, the Court unanimously struck down an Oklahoma statute because the penalty, disqualification for public office because of innocent membership in an organization supposed to be subversive, had no rational relation to the objective of the law, namely, the weeding out of subversive employees.

The lack of adequate rational relationship here between the objective sought, namely, undivided allegiance to the United States, and loss of nationality imposed for a dishonorable discharge based on a technical desertion for one day, hardly requires elaboration. Here nothing has been done which by the remotest stretch of the imagination justifies an inference of a purpose to transfer allegiance or to acquire any other nationality.

And our argument does not involve, as the Court below appeared to suppose (R. 11, 12), a ruling that there must be an intent to lose American citizenship. Citizenship may

to be sure, be lost when the national takes an affirmative step toward acquiring another nationality or expresses a preference for a dual nationality which he possesses, even though he be ignorant of the consequences of his act. In such a situation intent is irrelevant. But it is the intent to *lose* American nationality which is irrelevant, not the intent to *acquire* another nationality. That is crucial. So that unless the act performed has that effect it cannot be made the basis of denationalization. Anything else is pure legislative fiat, void as denial of due process.

In the cases cited by the court below (R. 11, 12) the problem here presented did not arise. For those cases held only that a person who voluntarily acquires another nationality thereby loses his American nationality even if he does not have the subjective intent to do so. Such was the case in *Mackenzie*, where the American national, a woman, obtained foreign nationality by marriage, and in *Savorgnan* and *Revedin*, where the American national voluntarily sought and acquired foreign citizenship and went to live in the foreign country.

Since in each of those cases there actually had been a voluntary acquisition of a new nationality, it was irrelevant that it was not understood or intended that American nationality should also be lost. It was quite proper for Congress to declare that dual nationality, under such circumstances, would be contrary to American interests. But here, where there has been neither an act of renunciation of United States citizenship nor an attempt at naturalization elsewhere, no dual nationality could possibly come into being. There is, therefore, no basis on which Congress can "consent" to an expatriation which has not happened.

In petitioner's brief in *Perez* (pp. 19-26) persuasive arguments are presented to demonstrate that, in effect, Congress has enacted a conclusive presumption that the performance of certain acts evidences a consent to loss of

nationality, when even a rebuttable presumption of such character might offend due process. We are glad to adopt these with only one additional observation.

Justification for the legislation here under attack is that the performance of the various acts listed as ground for loss of nationality constitutes that consent by the citizen without which it is clear there can be no expatriation. It would be just as appropriate to say that a person who violated the type of contract struck down in *Bailey* v. *Alabama*, 219 U. S. 219, after the law there involved was passed had agreed to be punished for fraud, as to say that petitioner, when he broke out of confinement in Casablanca, knowing that this might result in court martial for desertion and dishonorable discharge, had agreed to loss of nationality. Even with the most extreme application of the rule that everyone is presumed to know the law, the stretch required to accomplish the result claimed by the government defies common sense.

We submit, therefore, that regardless of the extent of Congressional power over loss of nationality there is here lacking such rational relationship between the act precipitating the alleged expatriation and the legitimate concern of Congress with allegiance to the United States as to result in denial of due process.

Pertinent is the observation of Mr. Justice Frankfurter, speaking for a unanimous Court in *Butler* v. *Michigan*, 352 U. S.—:

> "We have before us legislation not reasonably restricted to the evil with which it is said to deal."

So, here, subsection (g) is not reasonably restricted to the evil—abandonment of allegiance to the United States by adherence to its enemy in time of war. And like the statute in *Butler* it should be struck down.

III.

If the penalty be deemed punishment for the offense of desertion it is void.

If loss of nationality be viewed, not as a regulation of citizenship, but as punishment for an offense, we submit it is nonetheless not permissible.

1. In the first place, considerations of fundamental fairness in the administration of punitive law require that the penalties be part of that law so that it can readily be ascertained what penalties are imposed for what offenses. Cf. *Bell* v. *United States*, 349 U. S. 81. In accordance with that principle many sections of Title 18 of the United States Code provide that, in addition to fine or imprisonment, conviction shall result in loss of some of the rights of citizenship (as, e.g. §§ 202, 205, 206, 207, 216, 218, 281, 282, 2381, 2383, 2385, 2387).

But it is significant that nothing of similar import is to be found in the Articles of War. At the time of the "desertion" here in question the relevant provisions were contained in Articles 28 and 58 (10 U. S. C. 1499 and 1530); later these were consolidated into Section 679 of Title 50, now 10 U. S. C. 885. The only penalty prescribed for desertion is such as may be imposed by the court martial, with the possibility of death sentence if the offense was committed in war time. But a court martial was by Article 42 (then 10 U. S. C. 1513) limited in its power of punishment to certain kinds of imprisonment. Moreover, the court martial here made no attempt to add loss of nationality to its penalty (R. 9).

While we have found no authority dealing with this aspect of the case, its reasonableness may be demonstrated by a suppositious situation. If a law purporting to regulate a particular industry provided that no person convicted of

a certain crime might be licensed, no one would suppose, if the regulation were held to be beyond legislative power, that the disqualification could be saved as an additional punishment for a crime of the specified character, though that crime had been committed after the passage of the law.

2. As a "punishment" loss of nationality is so disproportionate to the offense of "desertion" for one day that this itself constitutes denial of due process. For surely the power of punishment, great though it be, is no more immune from the requirement of due process than is any of the other powers of Congress.

While this Court does not appear to have struck down any general statute on the ground that the punishment inflicted had no rational relation to the offense,* there can be little doubt about its power to do so. But since the relevant considerations have generally been discussed in relation to the Eighth Amendment rather than the Fifth we shall do so likewise.

3. In considering the issue of cruel and unusual punishments the courts have recognized the principle that punishment for a particular crime might violate the Constitution even though, in the abstract, the punishment was not cruel or unusual, when it had no reasonable relation to the offense for which it was imposed.

In *O'Neil* v. *Vermont*, 144 U. S. 323, it was claimed that cumulative sentences violated the Constitution. This Court dismissed the writ of error because no federal question had been presented or considered. But Mr. Justice Blatchford noted (p. 331) that the Vermont court had said: "If the penalty was unreasonably severe for a *single* offence, the constitutional question might be urged." Mr. Justice Field, in dissent, believing that a federal question had been

* *Weems* v. *United States*, 217 U. S. 349, comes under the Eighth Amendment which we discuss *infra*.

raised, said (p. 364): "It is against the excessive severity of the punishment, as applied to the offences for which it is inflicted, that the inhibition is directed." And Justice Harlan and Brewer agreed (p. 371).

In *Weems* v. *United States*, 217 U. S. 349, this Court held void a Philippine statute because it found that the punishment provided was excessively severe for the particular offense. Mr. Justice McKenna said (p. 367) "that it is a precept of justice that punishment for crime should be graduated and proportioned to offense." In a review of the cases and authorities which had considered the subject he pointed out (p. 372) that the Eighth Amendment covered more than laws "which inflicted bodily pain or mutilation". In reaching the conclusion that the particular law under scrutiny violated the Constitution he compared (pp. 380, 381) the penalty there inflicted with the less severe penalties for more serious offenses.

More recently the same view was expressed, though as dictum only, by Judge Martin of the Sixth Circuit in *Hemans* v. *United States*, 163 F. 2d 228, cert. den. 332 U. S. 801: "long-term imprisonment could be so disproportionate to the offense as to fall within the inhibition" (p. 237). Cf. *McDonald* v. *Commonwealth*, 173 Mass. 322, 328; 53 N. E. 874, 875.

Here, of course, we do not have any question of excessive length of imprisonment, or of punishment inflicting physical pain. But if loss of nationality be considered as punishment then, we submit, by the standards above laid down, it violates the Constitution.

For under this "punishment" petitioner would be subject to the many disabilities imposed by state legislatures on aliens (see Konvitz, The Alien and Asiatic in American Law; the Expatriation Act of 1954, 64 Yale L. J. 1164 at 1167 and 1189, and authorities cited). But the most significant aspect of this case, which distinguishes it from all

the other cases which this Court has heretofore considered, is that petitioner would, if the decision below stands, become a stateless person. And, while we have become accustomed to the stateless status of refugees from foreign tyranny and terror, it is something new in our life to consider the possibility of a stateless native born American. We may remember Edward Everett Hale's moving story of The Man Without a Country, doomed for one youthful error to wander the seas, or the troubled saga of the contemporary real character, Ignatz Mezei (*Shaughnessy* v. *United States*, 345 U. S. 206).

A further consequence of the holding below is that petitioner might be subject to deportation, for when he returned to the United States as an "alien," without passport and without visa, after his release by the army from confinement in Algeria (see R. 10) his entry into the United States could be considered an illegal one. As an "alien" he would have to register periodically (8 U. S. C. 1301-1306) and, if ordered deported, be subject to the supervision and penalties of Section 1252.

Pertinent are the observations of Professor Roche of Haverford, in The Loss of American Nationality, 99 University of Pennsylvania Law Review 25, at p. 70:

> "The legitimate end of an expatriation statute is to eliminate international problems of nationality by establishing standards by which it can be determined when an American has transferred his allegiance to another sovereign. Ideally speaking, an American should not be deprived of his citizenship until he has obtained that of some foreign state. At the very least, expatriation provisions should not be employed in the gratuitous creation of stateless persons by adding loss of citizenship to the other penalties for crimes against the sovereign."

See also 64 Yale Law J. 1164, 1187-1199 and authorities cited.

In other words, having in mind the absence of specific provision in the Constitution for loss of nationality, the requirements of due process of law as guaranteed by the Fifth Amendment and the prohibition against cruel and unusual punishment contained in the Eighth Amendment, Congress may not declare that nationality can be lost except on the basis of some action voluntarily taken which has direct relationship to the acquisition of another nationality.

Statelessness, condemned by all authorities on international law and the United Nations Universal Declaration of Human Rights (Art. 15, U. N. Doc. A/810) should not be approved by this Court.

IV.

The statute should be construed so as to avoid doubt about its constitutionality.

If the statute is limited to desertion to the enemy, then it has no application to the case at bar and the serious constitutional issues here presented need not be considered. Whenever possible this has been done by this Court. *United States* v. *Rumely*, 345 U. S. 41; *Peters* v. *Hobby*, 349 U. S. 331. See, generally, Note, Supreme Court Interpretation of Statutes to Avoid Constitutional Decisions, 53 Col. L. Rev. 633 (1953).

The court below rejected the construction of the present law here suggested on two grounds: (1) because of its "escape" clause (R. 11); (2) because of Section 1483 (a) (R. 12).

As to the first, we note only that there is no reason to suppose that a deserter to the enemy might not regret his action and, when the circumstances justified it, be absolved and permitted to reenlist and so regain his citizenship. As to the second, the contention is that the reference to acts performed within the United States precludes the possi-

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* Formerly Section 803(a).

bility that the desertion must be to an enemy. But there is no inherent incapacity in performing the act of desertion to the enemy within the United States (especially as the section includes also "its outlying possessions"). That would, of course, be easy were the enemy Mexico or Canada or if an enemy had obtained a foothold in our territory. And, of course, that is just what happened in 1942 when the Japanese occupied Guam and other islands. Finally, any act which began in the United States, as flight by ship or plane, would constitute desertion "while within the United States".

We submit that none of the arguments advanced against the suggested construction have validity.

CONCLUSION

The voice of Cicero coming down over 2,000 years reminds us that, during the period of Rome's greatness, Roman citizenship could be lost only by the acquisition of citizenship elsewhere. In *pro Caecina* he said he wanted "to bring it home to everybody that citizenship has never been and can never be taken away from any man".*

The statute should be held unconstitutional or not applicable. In either event the judgment should be reversed and judgment entered declaring that petitioner remains an American national.

Respectfully submitted,

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* Loeb Classical Library translation of Orations (1927), pp. 195-201, particularly par. XXXV, p. 201.